OVERVIEW OF EXPORT CONTROLS

I. INTRODUCTION

The U.S. export control system generally requires export licensing for defense items, for items that have both commercial and military applications, and for exports to sanctioned persons and destinations. U.S. national security, economic interests and foreign policy shape the U.S. export control regime. The export laws and regulations aim at achieving various objectives, such as preventing the proliferation of weapons of mass destruction, advancing the U.S. economic interests at home and abroad, aiding regional stability, implementing anti-terrorism and crime controls, and protecting human rights.

These controls generally restrict the export of products and services based on the type of product and the destination of the export. In both the defense and high-technology sectors, the U.S. Government tightly regulates the export not only of equipment and components, but also of technology. Technology includes technical data, such as blueprints and manuals, as well as design services (including the transfer of “knowledge”) and training. U.S. laws assert jurisdiction over U.S.-origin equipment and technology even after it is exported (i.e., restricting the re-export or re-transfer to third parties). In addition to general export licensing, the United States maintains economic embargoes against a number of countries whose governments consistently violate human rights or act in support of global terrorism. Such embargoes bar most transactions by U.S. persons with these countries.

Three principal agencies regulate exports from the United States: the U.S. Department of State Directorate of Defense Trade Controls (“DDTC”) administers export control of defense exports; the U.S. Department of Commerce Bureau of Industry and Security (“BIS”) administers export control of so-called "dual-use" technology exports; and the U.S. Department of the Treasury Office of Foreign Assets Control (“OFAC”) administers exports to embargoed countries and designated entities.

II. EXPORT CONTROLS AND UNIVERSITY RESEARCH

U.S. national security and economic interests are heavily dependent on technological innovation and advantage. Many of the nation's leading-edge technologies, including defense-related technologies, are being discovered by U.S. and foreign national students and scholars in U.S. university research and university-affiliated laboratories. U.S. policymakers recognize that foreign students and researchers have made substantial contributions to U.S. research efforts, but the potential transfer of controlled defense or dual-use technologies to their home countries could have significant consequences for U.S. national interests. The U.S. export control agencies place the onus on universities to understand and comply with the regulations.¹

Export controls present unique challenges to universities and colleges because they require balancing concerns about national security and U.S. economic vitality with traditional concepts of unrestricted academic freedom, and publication and dissemination of research findings and results. University researchers and administrators need to be aware that these laws may apply to research, whether sponsored or not. However, it also is important to understand the extent to which the regulations do not affect normal university activities.

III. EXPORT OF DEFENSE ARTICLES AND SERVICES – INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

Under the International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120-130, DDTC administers the export and re-export of defense articles, defense services and related technical data from the United States to any foreign destination, or to any foreign person, whether located in the United States or abroad. Section 121.1 of the ITAR contains the United States Munitions List (“USML”) and includes the commodities and related technical data and defense services controlled for export purposes. The ITAR controls not only end items, such as radar and communications systems, military encryption and associated equipment, but also the parts and components that are incorporated into the end item. Certain non-military items, such as commercial satellites, and certain chemical precursors, toxins, and biological agents, are also controlled.

A. ITEMS CONTROLLED UNDER THE ITAR

The ITAR uses three different terms to designate export controlled items – defense articles, technical data, and defense services. With rare exceptions, if an item contains any components that are controlled under the ITAR, the entire item is controlled under the ITAR. For example, a commercial radio that would normally not be controlled under the ITAR becomes a controlled defense article if it contains an ITAR-controlled microchip.

1. Defense Article: means any item or technical data that is specifically designed, developed, configured, adapted, or modified for a military, missile, satellite, or other controlled use listed on the USML. Defense article also includes models, mock-ups, or other items that reveal technical data relating to items designated in the USML.

2. Technical Data: means any information for the design, development, assembly, production, operation, repair, testing, maintenance, or modification of a defense article. Technical data may include drawings or assembly instructions, operations and maintenance manuals, and email or telephone exchanges where such information is discussed. However, technical data does not include general scientific, mathematical, or engineering principles commonly taught in schools, information present in the public domain, general system descriptions, or basic marketing information on function or purpose.

3. Defense Service: means providing assistance, including training, to a foreign person in the United States or abroad in the design, manufacture, repair, or operation of a defense article, as well as providing technical data to foreign persons. Defense services also include informal collaboration, conversations, or interchanges concerning technical data.

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2 The ITAR are promulgated pursuant to Section 38 of the Arms Export Control Act, 22 U.S.C. §§ 2778 et seq.

3 22 C.F.R. § 120.6.

4 22 C.F.R. § 120.10. Note that the ITAR uses the term "blueprints" to cover drawings and assembly instructions.

5 22 C.F.R. § 120.9.
B. **THE USML CATEGORIES**

The USML designates particular categories and types of equipment as defense articles and associated technical data and defense services.\(^6\) The USML divides defense items into 21 categories, listed below. An electronic version of the USML is available on the Department of State website at: [http://www.pmddtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_121.pdf](http://www.pmddtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_121.pdf).

I. Firearms, Close Assault Weapons and Combat Shotguns
II. Guns and Armament
III. Ammunition / Ordnance
IV. Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
V. Explosives, Propellants, Incendiary Agents, and their Constituents
VI. Vessels of War and Special Naval Equipment
VII. Tanks and Military Vehicles
VIII. Aircraft and Associated Equipment
IX. Military Training Equipment
X. Protective Personnel Equipment
XI. Military Electronics
XII. Fire Control, Range Finder, Optical and Guidance and Control Equipment
XIII. Auxiliary Military Equipment
XIV. Toxicological Agents and Equipment and Radiological Equipment
XV. Spacecraft Systems and Associated Equipment
XVI. Nuclear Weapons, Design and Testing Related Items
XVII. Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
XVIII. Directed Energy Weapons
XIX. [Reserved]
XX. Submersible Vessels, Oceanographic and Associated Equipment
XXI. Miscellaneous Articles

C. **CLASSIFICATION**

While DDTC has jurisdiction over deciding whether an item is ITAR- or EAR-controlled, it encourages exporters to self-classify the item. If doubt exists as to whether an article or service is covered by the USML, upon written request in the form of a Commodity Jurisdiction (“CJ”) request, DDTC will provide advice as to whether a particular article is a defense article subject to the ITAR, or a dual-use item subject to Commerce Department licensing.\(^7\) Determinations are based on the origin of the technology (i.e., as a civil or military article), and whether it is predominantly used in civil or military applications. University employees should contact the University Export Control Officer in the Office of Compliance when classifying an item. If The University of North Carolina at Charlotte needs to obtain a CJ determination, the Export Control Officer in

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\(^6\) See 22 C.F.R. § 121.1.

\(^7\) See 22 C.F.R. § 120.4. Note that DDTC has jurisdiction over determining whether an item is ITAR- or EAR-controlled. While BIS at Commerce provides assistance with determining the specific ECCN of a dual-use item listed on the CCL, if doubt exists as to whether an item is ITAR- or EAR-controlled, BIS will stay its classification proceeding and forward the issue to DDTC for jurisdiction determination.
D. **Definition of Export Under the ITAR**

The ITAR defines the term “export” broadly. The term applies not only to exports of tangible items from the U.S., but also to transfers of intangibles, such as technology or information. The ITAR defines as an “export” the passing of information or technology to foreign nationals even in the United States.”

The following are examples of exports:

1. **Exports of articles from the U.S. territory**
   - Shipping or taking a defense article out of the United States.
   - Transferring title or ownership of a defense article to a foreign person, in or outside the United States.

2. **Extra-territorial transfers**
   - The re-export or re-transfer of defense articles from one foreign person to another, not previously authorized (i.e., transferring an article that has been exported to a foreign country from that country to a third country).
   - Transferring the registration, control, or ownership to a foreign person of any aircraft, vessel, or satellite covered by the USML, whether the transfer occurs in the United States or abroad.

3. **Export of intangibles**
   - Disclosing technical data to a foreign person, whether in the United States or abroad, through oral, visual, or other means.
   - Performing a defense service for a foreign person, whether in the United States or abroad.

E. **Authorization to Export**

Generally, any U.S. person or entity that manufactures, brokers, or exports defense articles or services must be registered with DDTC. Registration is required prior to applying for a license or taking advantage of some license exemption. Once the registration is complete, an exporter may apply for an export authorization by submitting a relatively simple license application for the export of defense articles or technical data; or a complex license application, usually in the form of a Technical Assistance Agreement (“TAA”), for complex transaction that will require the U.S. entity to provide defense services. Most types of applications also contain additional certifications / transmittal letters, supporting documentation, and in some cases, non-transfer and use certification from the licensee and / or the foreign government of the licensee.

However, university researchers are usually engaged only in the creation of unclassified technical data.

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8 Instructions on the content of a CJ and the filing procedure are available at [http://www.pmddtc.state.gov/commodity_jurisdiction/index.html](http://www.pmddtc.state.gov/commodity_jurisdiction/index.html).

9 22 C.F.R. § 120.17.

10 22 C.F.R. § 122.1.

11 22 C.F.R. §§ 120.1(c) and (d); 122.1(c).
or engaged only in the fabrication of articles for experimental or scientific purpose, including research and
development. Therefore, the university is not usually required to register with DDTC. 12

However, if the university desires to involve foreign nationals in ITAR-controlled research, it must
register with the DDTC to apply for a license or take advantage of certain license exemptions. License
exemptions specific to universities, as well as licensing procedures, are described in detail in the Key Issues in
University Research section, below.

F. EMBARGOED COUNTRIES UNDER DDTC REGULATIONS

ITAR Prohibitions. In general, no ITAR exports may be made either under license or license
exemption to countries proscribed in 22 C.F.R. § 126.1, such as China, Cuba, Iran, North Korea, Sudan, and
Syria. Additional restrictions apply to other countries; a complete list of U.S. arms embargoes is available

IV. EXPORT OF COMMERCIAL DUAL-USE GOODS AND TECHNOLOGY – EXPORT ADMINISTRATION
REGULATIONS

The Department of Commerce Bureau of Industry and Security (“BIS”) regulates the export of
commercial products and technology under the Export Administration Regulations, 15 C.F.R. §§ 730-774
(“EAR”).13 While there are some parallels to the ITAR, there also are some major differences in how the
regulations and the relevant agencies function.

They are similar in that both agencies focus on “technology transfer” and have been increasingly
focused on enforcement. They differ in that the EAR covers a wider range of products and technology, the
product classification process is highly technical, and most importantly, the need for a license depends not only
on the type of product but on its final destination.

A. ITEMS CONTROLLED UNDER THE EAR

Generally, all items of U.S.-origin, or physically located in the United States, are subject to the EAR.
Foreign manufactured goods are generally exempt from the EAR re-export requirements if they contain less
than a “de minimis” level of U.S. content by value. Such “de minimis” levels are set in the regulations relative
to the ultimate destination of the export or re-export.

The EAR requires a license for the exportation of a wide range of items with potential “dual”
commercial and military use, or otherwise of strategic value to the United States (but not made to military
specifications). However, only items listed on the Commerce Control List (“CCL”) require a license prior to
exportation. Items not listed on the CCL are designated as EAR99 items and generally can be exported without
a license, unless the export is to an embargoed country, or to a prohibited person or end-use. 14 The following

12 See 22 C.F.R. §§ 122.1(b)(3) and (b)(4).

13 The EAR are promulgated under the Export Administration Act of 1979, as amended (50 U.S.C. app. §§ 2401-2420).
From August 21, 1994, through November 12, 2000, the Act was in lapse. During that period, the President, through
Executive Order 12924, which had been extended by successive Presidential Notices, continued the EAR in effect under
Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001,
which has been extended by successive Presidential Notices, has continued the EAR in effect under IEEPA.

14 15 C.F.R. § 734.
summarizes the types of items controlled under the EAR:

- **Commodities.** Finished or unfinished goods ranging from high-end microprocessors to airplanes, to ball bearings.

- **Manufacturing Equipment.** This includes equipment specifically for manufacturing or testing controlled commodities, as well as certain generic machines, such as computer numerically controlled ("CNC") manufacturing and test equipment.

- **Materials.** This includes certain alloys and chemical compounds.

- **Software.** This includes software specifically associated with particular commodities or manufacturing equipment, as well as any software containing encryption and the applicable source code.

- **Technology.** Technology, as defined in the EAR, includes both technical data, and services. Unlike the ITAR, there is generally no distinction between the two. However, the EAR may apply different standards to technology for “use” of a product than for the technology for the “design” or “manufacture” of the product.

B. **THE COMMERCE CONTROL LIST CATEGORIES**

The CCL provides a list of very specific items that are controlled. The CCL is similar to the "dual-use" list adopted by other countries under the Wassenaar Arrangement, although the CCL has additional items. The CCL is divided into the nine categories below. The CCL is available online at [http://www.access.gpo.gov/bis/ear/ear_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html).

**CATEGORIES**

0. Nuclear related items & miscellaneous items
1. Chemical compounds, microorganisms and toxins
2. Materials processing
3. Electronics
4. Computers
5. pt-1 Telecommunications
5. pt-2 Information security (encryption)
6. Sensors & lasers
7. Navigation and avionics
8. Marine (vessels, propulsion, and equipment)
9. Propulsion systems, space vehicles (includes aircraft & aircraft engines)

C. **CLASSIFICATION**

As discussed in Overview, Section III.C, DDTC has jurisdiction to decide whether an item is ITAR- or EAR-controlled. DDTC encourages exporters to self-classify the product. If doubt exists, a CJ request may be submitted to DDTC to determine whether an item is ITAR- or EAR- controlled.16

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15 Information on the Wassenaar Arrangement is available at: [http://www.bis.doc.gov/wassenaar/default.htm](http://www.bis.doc.gov/wassenaar/default.htm).

16 For a complete discussion, see Overview of Export Controls, Section III.C above.
Once it is determined that an item is EAR-controlled, the exporter must determine its Export Control Classification Number (“ECCN”). BIS has two assistance procedures where the proper ECCN classification or licensing requirements are uncertain.\(^{17}\) To determine EAR’s applicability and the appropriate ECCN for a particular item, a party can submit a “Classification Request” to BIS. To determine whether a license is required or would be granted for a particular transaction, a party can request BIS provide a non-binding “advisory opinion.” While BIS provides assistance with determining the specific ECCN of a dual-use item listed on the CCL, if doubt exists as to whether an item is ITAR- or EAR-controlled, BIS will stay its classification proceeding and forward the issue to DDTC for jurisdiction determination.

Unlike the ITAR, for classification purposes BIS generally looks at the classification of the complete product being exported rather than at the classification of each subcomponent of the item (i.e., "black box" treatment), as opposed to the "see through" treatment under the ITAR.

D. Definition of Export and Re-export Under the EAR

1. **Export.** Export is defined as the actual shipment or transmission of items subject to the EAR out of the United States. The EAR is similar to the ITAR in that it covers intangible exports of “technology,” including source code, as well as physical exports of items.

2. **Deemed Export.** Under the EAR the release of technology to a foreign national in the United States is "deemed" to be an export, even though the release took place within the United States. Deemed exports may occur through such means as a demonstration, oral briefing, or plant visit, as well as the electronic transmission of non-public data that will be received abroad.

3. **Re-export.** Similarly to the ITAR, the EAR attempts to impose restrictions on the re-export of U.S. goods, i.e., the shipment or transfer to a third country of goods or technology originally exported from the United States.

4. **Deemed Re-export.** Finally, the EAR defines "deemed" re-exports as the release of technology by a foreign national who has been licensed to receive it to the national of another foreign country who has not been licensed to receive the technology. For example, ECCN 5E001 technology may be exported to a university in Ireland under the license exception for technology and software, but might require a deemed re-export license authorization before being released to a Russian foreign national student or employee of that university in Ireland.

E. Authorization to Export

Once determined that a license is required, an exporter can apply for export authorization from BIS. Unlike the ITAR, there is no requirement for formal registration prior to applying for export authorization. Additionally, the EAR has no equivalent to the TAA used in ITAR exports.

The EAR contains a number of exceptions. Determining whether a particular exception applies requires review of the specific application as detailed in 15 C.F.R. § 740, as well as review of the notes on applicable license exceptions following the ECCN entry on the CCL.\(^ {18}\)

Each category of the CCL contains ECCNs for specific items divided into five categories, A through E: "A" refers to specific systems or equipment (and components); "B" refers to test, inspection and production

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\(^{17}\) See 15 C.F.R. § 748.3.

\(^{18}\) 15 C.F.R. § 740.
equipment; "C" refers to materials; "D" refers to software; and "E" refers to the technology related to that specific equipment. For example, most civil computers would be classified under ECCN 4A994. The "4" refers to Category 4, Computers, and the "A" refers to the subcategory, i.e., equipment. Generally, if the last three digits begin with a 'zero' or 'one' (e.g., 4A001), the product is subject to stringent controls, whereas if the last three digits are a "9XX" (e.g., 4A994), then generally there are fewer restrictions on export.

Once an item has been classified under a particular ECCN, a person can determine whether a license is required for export to a particular country. The starting place is the information following the ECCN heading. The "List of Items Controlled" describes the specific items covered or not covered by the ECCN.

1. **Determine Reason for Controls.** The "License Requirements" section provides notations as to the reasons for control. These reasons include:

   | AT | Anti-Terrorism       | CB | Chemical & Biological Weapons |
   | CC | Crime Control        | CW | Chemical Weapons Convention  |
   | EI | Encryption Items     | FC | Firearms Convention          |
   | MT | Missile Technology   | NS | National Security            |
   | NP | Nuclear Nonproliferation | RS | Regional Security            |
   | SS | Short Supply         | XP | Computers                    |
   | SI | Significant Items    |

The most commonly used controls are Anti-Terrorism and National Security, while other controls only apply to limited types of articles. For example, ECCN 4A994 lists “License Requirements: Reason for Control: AT” (i.e., anti-terrorism) and the following:

<table>
<thead>
<tr>
<th>Control(s)</th>
<th>Country Chart</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT applies to entire entry</td>
<td>AT Column 1</td>
</tr>
</tbody>
</table>

2. **Apply Country Chart.** Once an item is identified as meeting the criteria for a particular ECCN, the user can refer to the chart found at 15 C.F.R. § 738, Supp. 1. If the particular control applies to that country, a license is required. For example, Syria has an “X” under AT Column 1, therefore a license would be required unless an exception applied.

3. **Exceptions.** The EAR contains a number of exceptions. Determining whether a particular exception applies requires review of the specific application as detailed in 15 C.F.R. § 740, as well as review of the notes on applicable license exceptions following the ECCN entry. These exceptions include:

   | LVS | Items of limited value (value is set under each ECCN). |
   | GBS | Items controlled for national security reasons to Group B countries. |
   | CIV | Items controlled for national security reasons to particular countries where end-user is civilian. |
   | TSR | Certain technology and software to certain countries. |
   | APP | Computer exports to certain countries. |
KMI Encryption exemption for key management.

TMP Certain temporary exports, re-exports, or imports, including items moving through the U.S. in transit.

RPL Certain repair and replacement parts for items already exported.

GFT Certain gifts and humanitarian donations.

GOV Exports to certain government entities.

TSU Certain mass-market technology and software.

BAG Baggage exception.

AVS Aircraft and vessels stopping in the U.S. and most exports of spare parts associated with aircraft and vessels.

APR Allows re-export from certain countries.

ENC Certain encryption devices and software.

AGR Agricultural commodities.

CCD Authorization of certain consumer communication devices to Cuba.

License exceptions specific to universities, as well as licensing procedures, are described in detail in Key Issues in University Research below.

V. OFAC SANCTIONS PROGRAM AND BARRED ENTITIES LISTS

A. SANCTIONED COUNTRIES

U.S. economic sanctions broadly prohibit most transactions between a U.S. person and persons or entities in an embargoed country, including Cuba, Iran, North Korea, Syria, and Sudan. This prohibition includes importation and exportation of goods and services, whether direct or indirect, as well as "facilitation" by a U.S. person of transactions between foreign parties and a sanctioned country. For example, sending a check to an individual in Iran could require an OFAC license or be prohibited. More limited sanctions may block particular transactions or require licenses under certain circumstances for exports to a number of countries, including but not limited to Burma, Liberia, and Zimbabwe. Because this list is not complete and subject to change, please visit http://www.treas.gov/offices/enforcement/ofac/.

While most sanctions are administered by OFAC, BIS has jurisdiction over certain exports prohibitions (via “embargo” regulations), as is the case with exports to Syria. In other words, a license from BIS would be

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19 With the exception of the sanctions on Cuba and North Korea, OFAC sanctions are promulgated under the International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701-1706 (IEEPA). The embargoes on Cuba and North Korea are promulgated under the Trading with the Enemy Act of 1917, 12 U.S.C. § 95a (TWEA).


21 See 15 C.F.R. § 746.
required to ship most items to Syria and other OFAC sanctioned countries or could be prohibited. Economic sanctions and embargo programs are country-specific and very detailed in the specific prohibitions.

B. TERRORIST AND OTHER BARRED ENTITY LISTS

Various U.S. Government agencies maintain a number of lists of individuals or entities barred or otherwise restricted from entering into certain types of transactions with U.S. persons. Particularly since 9/11, U.S. companies are beginning to become more assertive in attempting to place contractual terms with foreign companies related to these lists. Such lists must be screened to ensure that the university does not engage in a transaction with a barred entity. UT Austin, under a UT system-wide license, uses Visual Compliance™ to expedite screening of these and other lists.

- **Specially Designated Nationals and Blocked Persons List (“SDN List”).** Maintained by OFAC, this is a list of barred terrorists, narcotics traffickers, and persons and entities associated with embargoed regimes. Generally, all transactions with such persons are barred. The SDN List is available at: [http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml](http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml).


- **List of Debarred Parties.** The Department of State bars certain persons and entities from engaging in the export or re-export of items subject to the USML (available at: [http://www.pmddtc.state.gov/compliance/debar.html](http://www.pmddtc.state.gov/compliance/debar.html)). Note that the number of countries subject to a U.S. arms embargo is much broader than those subject to OFAC embargoes. See [http://www.pmddtc.state.gov/embargoed_countries/index.html](http://www.pmddtc.state.gov/embargoed_countries/index.html).

- **Denied Persons List.** These are individuals and entities that have had their export privileges revoked or suspended by BIS. The Denied Persons List is available at: [http://www.bis.doc.gov/dpl/Default.shtm](http://www.bis.doc.gov/dpl/Default.shtm).

- **Entity List.** These are entities identified as being involved in proliferation of missile technology, weapons of mass destruction, and related technologies. The Entity List is available at: [http://www.bis.doc.gov/Entities/Default.htm](http://www.bis.doc.gov/Entities/Default.htm).

- **Unverified List.** These are foreign persons and entities for which BIS has been unable to verify the nature of their operations. While transactions with these entities are not barred, special due diligence is required. The Unverified List is available at: [http://www.bis.doc.gov/Enforcement/UnverifiedList/unverified_parties.html](http://www.bis.doc.gov/Enforcement/UnverifiedList/unverified_parties.html).

- **Excluded Parties List.** These are entities that have been barred from contracting with U.S. Government agencies. In general, companies cannot contract with such parties in fulfilling a U.S. Government contract, either as prime or sub-contractor. The EPLS is available at: [http://www.epls.gov/](http://www.epls.gov/).

- **Non-proliferation Sanctions** maintained by the Department of State. These lists are available at: [http://www.state.gov/t/isn/c15231.htm](http://www.state.gov/t/isn/c15231.htm).
VI. **ANTI-BOYCOTT RESTRICTIONS**

The anti-boycott rules were implemented to prevent U.S. business from participating directly or indirectly in the Arab League’s boycott of Israel. The laws prevent U.S. persons from doing business under terms that would restrict that person’s ability to do business with other countries under a boycott not recognized by the U.S. The Arab League’s boycott has lessened over the years, but still remains in effect in some countries. These restrictions are enforced by BIS. The applicable regulations are at 15 C.F.R. § 760.

Anti-boycott restrictions are most likely to appear in dealings with entities in certain Arab League countries. As of this writing, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen continue to impose boycott restrictions on Israel and companies that do business with Israel. Iraq is not included in this list, but its status with respect to the future lists remains under review by the Department of Treasury.22 Egypt and Jordan have ceased participating in the boycott.

Note that there are strict reporting requirements even where the U.S. person refuses to participate in a requested boycott action.

A. **JURISDICTION**

These laws generally apply to any person or entity in the U.S., and to U.S. persons or entities abroad. As examples, the laws apply to:

- A foreign company’s affiliate or permanent office in the U.S.
- A U.S. company’s foreign affiliate’s transaction with a third-party if that affiliate is controlled by the U.S. company and involves shipment of goods to or from the U.S.

B. **RED FLAGS**

The Commerce Department has set forth the following red-flags to look for as signs of anti-boycott restrictions:

- Agreements to refuse or actual refusals to do business with Israel or with blacklisted companies.
- Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin, or nationality.
- Furnishing information about business relationships with Israel or with blacklisted companies.
- Furnishing information about the race, religion, sex, or national origin of another person.
- Paying or otherwise implementing letters of credit that include requirements to take boycott-related actions prohibited by the anti-boycott regulations.

These restrictions may appear on pre-printed portions of agreements.

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C. EXCEPTION

A major exception to the anti-boycott rules is the provision that permits compliance with the import requirements of a boycotting country. This exception permits firms to comply with import restrictions that prohibit imports from Israel or Israeli firms. The exception does not permit compliance with a boycott of blacklisted firms outside of Israel, nor does it allow for the issuance of a negative certificate-of-origin of any type. Other exceptions allow firms to provide country-of-origin information on the shipping documents, or information required for immigration or employment purposes. The exceptions can be found at 15 C.F.R. § 760.3.

D. REPORTING

Any U.S. person or entity who is asked to enter into an agreement or provide information that would violate anti-boycott laws must report this to BIS using a form BIS-621-P in accordance with 15 C.F.R. § 760.5. Information regarding the reporting of suspected anti-boycott activities can be found at http://www.bis.doc.gov/ComplianceAndEnforcement/index.htm. In addition, the U.S. Internal Revenue Service (IRS) requires U.S. taxpayers to report operations in or relating to boycotting countries and nationals and request to cooperate with boycott activities. See IRS Form 5713, located online at: http://www.irs.gov/pub/irs-pdf/f5713.pdf.

These reporting requirements apply even where the U.S. person or entity refuses to participate. Crossing out the boycott language in a proposed contract does not end the matter. The duty to report remains even where the requesting foreign entity accepts the redaction of the boycott language.

For more information on anti-boycott rules see: http://www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm. The Office of Boycott Compliance has also set up an advice line for questions about the anti-boycott rules, which can be reached at (202) 482-2381.

VII. PENALTIES FOR EXPORT VIOLATIONS

A. GENERAL OVERVIEW

Generally, any person or entity that brokers, exports, or attempts to export a controlled item without prior authorization, or in violation of the terms of a license, are subject to penalties. Violators may incur both criminal and civil penalties. Although there is a maximum amount for a civil or criminal penalty, the actual penalty imposed is often multiplied. For instance, each shipment might be considered a separate violation, and BIS will often find multiple violations of related restrictions in connection to each shipment (e.g., export without a license, false representation, actions with knowledge of a violation, etc.). A series of violations occurring over a period of time may result in hundreds of thousand or even millions of dollars of penalties.

B. DEFENSE EXPORTS

The Arms Export Controls Act and the ITAR provide that wilful violations of the defense controls can be fined up to $1,000,000 per violation, or ten years of imprisonment, or both.23 In addition, the Secretary of State may assess civil penalties, which may not exceed $500,000 per violation.24 The civil penalties may be imposed either in addition to, or in lieu of, any other liability or penalty. The articles exported or imported in violation, and any vessel, vehicle or aircraft involved in such attempt is subject to seizure, forfeiture and

23 22 U.S.C. § 2778(c) and 22 C.F.R. § 127.3.

24 22 U.S.C. § 2778(e) and 22 C.F.R. § 127.10.
Finally, the Assistant Secretary for Political-Military Affairs may order debarment of the violator, i.e., prohibit the violator from participating in export of defense items.\textsuperscript{26}

While imposing criminal liability is fairly rare, many major U.S. companies have been assessed significant civil penalties in the millions of dollars.\textsuperscript{27} For example, an investigation into the export practices of ITT Corporation, the leading manufacturer of military night vision equipment for the U.S. Armed Forces, resulted in the company's Night Vision Division being debarred from export of defense items for three years. In addition, pursuant to a plea agreement ITT agreed to pay a total of $100 million for its violations of defense export laws, one of the largest penalties ever paid in a criminal or civil case.\textsuperscript{28}

Both DDTC and BIS have stated that they believe that many universities are in violation of the regulations based on the low number of licenses received in relation to the number of foreign students enrolled.

\textbf{C. DUAL-USE ITEMS EXPORTS AND ANTI-BOYCOTT VIOLATIONS}

Similarly to the ITAR, violations of the EAR are subject to both criminal and administrative penalties. Fines for export violations, including anti-boycott violations, can reach up to $1,000,000 per violation in criminal cases, and $250,000 per violation in most administrative cases. In addition, criminal violators may be sentenced to prison time up to 20 years, and administrative penalties may include the denial of export privileges.\textsuperscript{29} A denial order is probably the most serious sanction because such order would bar a U.S. company from exporting for a period of years or bar a foreign entity from buying U.S. origin products for such period.

In most instances, BIS reaches negotiated settlements in its administrative cases, as a result of voluntary self-disclosures of violations by companies and individuals. Voluntary disclosures constitute a major mitigating factor in determining penalties, reducing the amount of penalty by up to 50\%, provided certain conditions are

\textsuperscript{25} 22 C.F.R. § 127.6.

\textsuperscript{26} 22 U.S.C. § 2778(g) and 22 C.F.R. § 127.7.

\textsuperscript{27} For a thorough discussion of penalties imposed under the ITAR, see John C. Pisa-Relli, "Monograph on U.S. Defense Trade Enforcement" (February 2007).


\textsuperscript{29} These violations are based on the Export Administration Act of 1979, as amended (50 U.S.C. app. §§ 2401-2420), and inflation adjustments made in 15 C.F.R. § 6.4. From August 21, 1994, through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, continued the EAR in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (IEEPA). On November 13, 2000, the Act was reauthorized by Pub. L. No. 106-508 (114 Stat. 2360 (2000)) and it remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001, which has been extended by successive Presidential Notices, has continued the EAR in effect under IEEPA. The USA PATRIOT Improvement and Reauthorization Act of 2005, signed into law on March 9, 2006 (Pub. L. No. 109-177, 120 Stat. 192 (2006)), increased the limit of civil penalties available under IEEPA to $50,000. On October 16, 2007, President Bush signed the International Emergency Economic Powers Enhancement Act, Pub. Law No. 110-96, which amends IEEPA by increasing civil penalties up to $250,000 per violation, and criminal penalties up to $1,000,000 per violation.
D. EXPORTS TO A SANCTIONED COUNTRY

Although potential penalties for violations of U.S. export laws vary depending on the country and product involved, an exporter may be subject to a maximum civil penalty of $250,000 per violation under OFAC regulations, with the exception of exports to Cuba. Violations of the Cuban sanctions are subject to a maximum penalty of $65,000 per violation.

The U.S. Government can also seek to criminally prosecute conduct where violations are willful and knowing. Such violations may reach $1,000,000 per violation and imprisonment of up to 20 years. In addition, where there is egregious conduct by the offender, BIS (who assists OFAC in enforcing sanctions) may suspend the export privileges of a company.

In assessing penalties, DDTC, BIS, and OFAC will consider a number of factors, both aggravating and mitigating. Mitigating factors include (1) whether the disclosure was made voluntarily; (2) whether this was a first offense; (3) whether the company had compliance procedures; (4) whether steps were taken to improve compliance after discovery of violations; and (5) whether the incident was due to inadvertence, mistake of fact, or good faith misapplication of the laws. Aggravating factors include: (1) willful or intentional violations; (2) failure to take remedial action after discovery; (3) lack of a compliance program; and (4) deliberate efforts to hide or conceal a violation.

The University of North Carolina at Charlotte greatly appreciates all the assistance that The University of Texas at Austin has supplied.

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30 For a review of BIS investigations and penalties, see "Don't Let This Happen to You! Actual Investigations of Export Control and Anti-boycott Violations" at http://www.bis.doc.gov/complianceandenforcement/dontletthishappentoyou-2008.pdf.

31 Violations of most of the Economic Sanction Regulations are set under the IEEPA. See supra note 30.

32 The OFAC embargo of Cuba was promulgated under the Trading with the Enemy Act (TWEA).